In the Supreme Court of the United States

October Term, 1979

No. 79-1420

In re:

MULTI-PIECE RIM PRODUCTS LIABILITY LITIGATION

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

vs.

JOHN C. RISJORD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The origin of the petition of The Firestone Tire & Rubber Company (hereinafter "Firestone") was a motion filed May 23, 1979, (Record 62) to disqualify respondent John C. Risjord (hereinafter "Risjord") from the representation of four sets of plaintiffs in suits against Firestone

which cases and others are pending in multi-district proceedings styled *Multi-Piece Rim Litigation* before the United States District Court for the Western District of Missouri.[1] The respective Complaints filed by those plaintiffs against Firestone contain essentially identical allegations based upon defective products manufactured by Firestone. The Complaints also allege that Firestone, and in some cases Goodyear, negligently, willfully and intentionally committed some twelve specific failures or deliberate acts, withheld information, misrepresented materials facts and engaged in fraudulent misrepresentation. (Record 324-412).

Home Insurance Company is the insurer for Firestone, and Firestone's claim of conflict arises out of representation of Home by Risjord in an unrelated case. Under its policy, Home has no duty to provide a defense for Firestone in the Multi-Piece Rim cases. In one of the four cases, Home does not afford coverage to Firestone and in others provides coverage apparently over a self-retained limit of $500,000. (Supplemental Record 454, 456, Ex. A).

In the "Second Pretrial Order" entered by the District Court following a hearing on August 10, 1979, the Court set forth the stipulated facts regarding the status and relationship between Risjord and Home, and out of which the present dispute arose as follows:

* * *

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1. All cases involve alleged injuries or death to persons who claim they were struck by an exploding metal wheel manufactured by Firestone. The cases are the *Rodriquez* case, filed in 1977, and alleging brain damage to a teenager; the *Goodwin* case, filed in 1978 by a spouse and four minor children for wrongful death; the *Butler* case, filed in August of 1978, and alleging blindness and other injuries to plaintiff; and the *Hale* case, filed in April of 1978, and alleging a traumatic amputation of plaintiff's nose. (Record 324-412).

At the pretrial conference that was held on August 10, 1979, the following facts were stipulated by Mr. Risjord and Firestone:

> 1) For the past several years, and until the present time, Mr. Risjord's law firm has included Home Insurance Company in its list of clients published in the Martindale-Hubbell Law Directory;
>
> 2) During the past several years Mr. Risjord's law firm has represented Home Insurance Company in litigation that was not related to this pending case;
>
> 3) Neither Mr. Risjord nor his law firm has ever represented Home Insurance Company in litigation that is related to this pending action;
>
> 4) Home Insurance Company does not pay a retainer fee to Mr. Risjord or to his law firm, but does employ his law firm from time to time on a case-by-case basis;
>
> 5) Mr. Risjord's firm was employed in January, 1974, to represent Home Insurance Company in a suit on a fire insurance policy, which suit is presently pending in the Circuit Court of Jackson County, Missouri [*Cannova* litigation];
>
> 6) In at least two of the cases consolidated into this multidistrict proceeding, Mr. Risjord represents plaintiffs who have named Firestone as a defendant in their case;
>
> 7) Home Insurance Company is the liability insurance carrier who insures Firestone against excess liability in the two cases in which Mr.

> Risjord's clients have sued Firestone. (Transcript, Pretrial Conf., August 10, 1979; Firestone Pet., App. A, pp. 1-2).

These stipulations arose out of a considerable record consisting of briefs, related pleadings, affidavits and the depositions of Risjord.[2]

The District Court considered the question of conflict and the assertion of Firestone, albeit unfounded and unsupported, of the possibility of collusion between Risjord and Home in his handling of the present actions. After having considered all the facts before it, the District Court found that Disciplinary Rule 5-105(A) and (C) of the Code of Professional Responsibility adopted by the Missouri Supreme Court and by the United States District Court in

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2. Risjord in his deposition described the *Cannova* lawsuit (*Cannova Enterprises, Inc. v. Great American Insurance Co., et al.*, in the Circuit Court of Jackson County) as the only one he handled for Home in ten years. (Risjord depo. 82). Risjord has represented the Home's fire insurance company as long as he practiced law, but had not represented the company writing casualty business since he left Lowell Knipmeyer 19 or 20 years ago. (Risjord depo. 77). The *Cannova* litigation resulted in a claim for libel being asserted against Risjord as a defendant (Risjord depo. 79) and Mr. Sanders, counsel for Firestone, was employed by St. Paul Fire & Marine to defend Risjord in that action. (Risjord depo. 80). Mr. Sanders knew of Risjord's representation of Home four years ago at a meeting with Risjord. (Risjord depo. 81). Risjord was totally unaware that Firestone Tire & Rubber Company was insured or reinsured by Home Insurance Company. (Risjord depo. 83). He had no recollection of ever doing anything on behalf of any insurer for Firestone or any subsidiary or affiliated company. (Risjord depo. 83). Risjord has suggested to his partners that their list of clients be alphabetized in Martindale-Hubbell but this has never been done. (Risjord depo. 90). In the last ten years, the number of cases in which his law firm handled work for the Home Insurance Company is very minimal and ordinarily stock companies split fire risks and a lead company hires counsel that represents the group, which is the way he happened to represent Home in this particular case. (Risjord depo. 92-93). Risjord has no recollection of defending a Home Insurance Company insured in the last 19 or 20 years, and he knows nothing of their way of undertaking to represent policyholders in litigation, and is unaware that his partners have. (Risjord depo. 93, 94).

its Rule 43, was applicable. In particular, the lower court determined that the representation by Risjord of Home Insurance Company in a totally unrelated fire claim and his representation of plaintiffs was a situation requiring either that Risjord withdraw from his representation of either plaintiffs or Home or that Risjord obtain the informed consents of plaintiffs and Home. The Court found from all the facts and arguments presented to it that this was a situation where it was obvious that Risjord could adequately represent the interests of Home and plaintiffs if each consented thereto, after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on their behalf. DR 5-105(C). The Court, following the guidelines of DR 5-105 (C), ordered Risjord to obtain consents from Home Insurance Company and from the plaintiffs he represented or, in the alternative, to terminate either his representation of the plaintiffs in the cases in which Firestone was a defendant, or his representation of Home Insurance Company. The District Court further certified this ruling for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Firestone Pet., App. A, pp. 1-6).

Following the Order of the District Court, Risjord obtained consents from plaintiffs and from Home Insurance Company and those consents were filed and incorporated into the record. (Record 301, 302, 303-312). Without following the provisions of 28 U.S.C. § 1292(b), Firestone took an appeal to the United States Court of Appeals for the Eighth Circuit arguing that the trial court had abused its discretion in making its factual findings and entering its disqualification order. During the pendency of the appeal, Risjord's representation of Home Insurance Company in the *Cannova* case was terminated by Home. (Supplemental Record 435-440). Risjord, in addition to responding to the

brief of appellant Firestone, filed a motion to obtain dismissal of the appeal asserting that the District Court's decision was not a final one under 28 U.S.C. § 1291.

The record submitted to the Circuit Court of Appeals included all the motions, arguments, pleadings and affidavits with respect to Firestone's motion to disqualify, the depositions of Risjord and the transcript of the second pretrial conference. All told it approximated 685 pages and contained all the factual data which had been before the District Court before it entered its order, as well as all documents relating to the consents and other indicia of compliance with the Court's Order by Risjord. Appellant Firestone submitted both an opening brief numbering 43 pages and a reply brief numbering 23 pages. Appellee Risjord submitted a brief numbering 47 pages. Based upon this record and the briefs before it, the Eighth Circuit Court of Appeals sitting *en banc* ruled unanimously with respect to Firestone's appeal as follows:

> In fairness to the appellant in the instant case, we hold the overruling of *Weber* and *Dean Foods* to be prospective only. Thus, we permit the instant appeal. Nevertheless, we have carefully reviewed the pleadings, and briefs, and have concluded that the district court did not abuse its discretion in refusing to disqualify counsel. Accordingly, the motion to dismiss is denied, the district court's denial of the motion to disqualify is affirmed, and the case is remanded to the district court for further proceedings. (Firestone Pet., App. B, p. 10).

From the judgment of the Court of Appeals affirming the District Court and remanding this matter for further proceedings, Firestone seeks review by this Court.

QUESTIONS PRESENTED

I. Should this Court grant certiorari to consider the question of the appealability, pursuant to 28 U.S.C. § 1291, of an order denying a motion to disqualify counsel where resolution of that question would have no effect upon the disposition of petitioner's motion to disqualify and where such question is not appropriate for Supreme Court review?

II. Should this Court grant certiorari to consider the question of whether the District Court abused its discretion where the question of that Court's abuse of discretion was fully considered by the United States Court of Appeals for the Eighth Circuit *en banc* and where no important question of federal law is involved?

REASONS FOR DENYING A WRIT OF CERTIORARI

I. The existence of a conflict among the Circuit Courts of Appeal does not justify review by this Court of the question of the handling of a denial of a motion to disqualify on appeal since there exists no "live" controversy as to that issue and because the question itself is not appropriate for review.

Since there is no live controversy in this case on the question of the handling of the denial motions to disqualify on appeal, there is no justification for review of that issue by this Court. The issue relating to appealability of orders denying a motion to disqualify was ruled only prospectively by the Court of Appeals and did not affect its decision on the merits. Thus, the granting of certiorari would do no more than have the Supreme Court review the exercise of discretion by the District Court, which has already been reviewed by the Court of Appeals. (See Point II, *infra*).

One of petitioner Firestone's bases, however, for seeking a writ of certiorari lies in that portion of the Court of Appeals opinion dealing with the appealability of an order denying a motion to disqualify pursuant to 28 U.S.C. § 1291, and Firestone's contention that it was aggrieved thereby. Although the Court of Appeals notes the availability to Firestone of 28 U.S.C. § 1292(b), even after certification by the District Court, and its failure to follow the requirements of that section, the Court nevertheless entertained Firestone's appeal, and upheld the action of the trial court as not involving an abuse of discretion. Even though the Court charted a course consistent with that chosen by the Sixth Circuit in *Melamed v. ITT Continental Baking Company*, 592 F.2d 290, 295 (1979), the issue of appealability of the order entered by the District Court herein was considered and ruled in favor of petitioner Firestone and against respondent Risjord. While the motion to dismiss and its denial by the Eighth Circuit gave the court the opportunity to consider and clarify its position on the handling of orders denying disqualification, Firestone cannot complain of the Court's decision on that issue, since Risjord's motion to dismiss Firestone's appeal was denied.

Conceding the divergence between the Circuits on this issue, the very nature of the ruling and opinion of the Eighth Circuit Court of Appeals makes this case an inappropriate one to resolve such a conflict, assuming this Court felt it were appropriate to do so. Affirming or reversing the Eighth Circuit's decision on that issue would not in any way affect the ruling in this case.

Firestone disagrees with the Eighth Circuit's opinion on appealability, citing *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation*, 496 F.2d 800 (2d Cir. 1974). Assuming that Firestone would continue to urge that position before this Court if certiorari were in fact granted,

there would be no "live" controversy between Firestone and Risjord with respect to appealability of the denial of motions to disqualify. Indeed, the only argument of Firestone which involves a controversy relates to the exercise of discretion by the District Court and that argument represents no conflict between the circuits, no significant question or issue of federal law and no question meriting consideration by this Court and is not, as described by petitioner, a question which is "ancillary" to the appealability issue. That issue of discretion has been decided and the adoption or rejection of the Eighth Circuit's prospective ruling on appealability by this Court will not affect Risjord's status. A burden should not be placed on Risjord to argue the appealability issue under such circumstances.

Where resolution of a conflict between the circuits of an issue presented to the Court can have no effect on the parties before the Court, an adequate basis or grounds for certiorari does not exist. *S. S. Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959). In that action, this Court dismissed a writ of certiorari as having been improvidently granted, where it was determined that the issue giving rise to the original grant of certiorari would have no effect upon the litigants or upon the outcome of the case. The Court ruled that deciding such a case on certiorari would be improper, even though there existed a conflict between two of the Circuit Courts of Appeal on the very issue upon which certiorari had been granted originally. In making that ruling, this Court stated at page 184 as follows:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which

> these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly.

By the same token, resolution, in this case, of the conflict between the circuits on the question of how to deal with an order denying a motion to disqualify would serve no judicial function, and, therefore, parties seeking to raise it should await a day when it can be presented to the Court in the context of a live controversy with litigants on both sides of the issue, who are interested in the manner in which the conflict is resolved.

In an apparent attempt to make the appealability question into a live controversy, petitioner argues that with respect to the judgment of the Court of Appeals on the merits it did not get a fair hearing and that the action of the appellate court was "perfunctory," "pro forma" or little more than "footnote" treatment. Such contentions, having nothing to do with Firestone's Point I, are nothing more than speculation on its part and are without foundation in the record. In fact, the opinion of the Court of Appeals itself negates the petitioner's contention. In reaching its decision on the merits, the Court stated that ". . . we have carefully reviewed the pleadings and briefs. . . ." (Firestone Pet., App. B, p. 10). A substantial record and significant briefing were submitted to the Court and received full consideration by it. In all likelihood the treatmen of the Firstone position by the Court of Appeals demonstrates its conclusion that the Firestone position was completely lacking in merit.

Similarly, petitioner's contention that the Court of Appeals' denial of oral argument evinces a lack of concern by the Court for the merits of this case is without foundation. There exists no right to oral argument, and the absence of thirty minutes of oral argument cannot change

the fact that the entire record was considered by the Court. Thus, petitioner's efforts to create a controversy with respect to the appealability issue where none exists must fail.

Petitioner carries this point further by hypothesizing that the Court of Appeals was prevented from deciding the issues because of procedural considerations and the possibility that having discussed this appeal on the merits would have made the Eighth Circuit's prospective overruling of its prior appealability decisions much like an advisory opinion. However, petitioner fails to explain how a more detailed discussion of the merits of its appeal would have changed the character of the Court's opinion with respect to its new rule on the issue of appealability, let alone the result in this case. In fact, Firestone's raising of the specter of an advisory opinion such as discussed in *Muskrat v. United States,* 219 U.S. 346 (1911), only points to the fact that the granting of certiorari and the entertaining of the appealability question here would, according to petitioner's reasoning, place the Supreme Court in the position of doing just what petitioner Firestone complains, rendering an opinion which would be advisory only and have no effect upon the parties.

Finally, the appearance of a conflict between the Circuits in and of itself does not make the handling of motions to disqualify by the Circuit Courts one of such significance as to merit Supreme Court review in this case. Indeed, the appealability question in the context of this case is not of such significance or importance to merit review. Past considerations of the finality question in other instances before this Court have themselves been threshold questions to consideration of substantial or significant questions of federal law. *E.g., Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541, 545-47 (1949); *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974); *Gillespie v. United States*

Steel Corporation, 379 U.S. 148 (1964); *Brown Shoe Company v. United States*, 370 U.S. 294 (1962). Further, on those occasions when the Supreme Court has spoken, it has set down guidelines for utilization by the Courts of Appeal recognizing the need for practical rather than technical application of these guidelines to the questions or situations involved. *Cohen v. Beneficial Industrial Loan Corporation, supra; Eisen v. Carlisle & Jacquelin, supra* at 170-171; *Gillespie v. United States Steel Corporation, supra* at 154; *Brown Shoe Company v. United States, supra.* Having set down those guidelines, their application by the Courts of Appeal each time the issue of finality is raised does not make their application, as here, a matter of significance for Supreme Court review.

Beyond this, the existence of a conflict among the circuits does not justify review by this Court for an additional reason. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation, supra,* cited by Firestone as the "leading case," and its approach to the handling of the denial of motions to disqualify at the appellate level has come under severe criticism by the court that decided it. Criticism has arisen from the proliferation of motions to disqualify, often cited as a tactic of defense, and the resulting flood of appeals. *See* criticism found in, *Board of Education of the City of New York v. Nyquist,* 590 F.2d 1241 (2d Cir. 1979); *Allegaert v. Perot,* 565 F.2d 246 (2d Cir. 1977); *W. T. Grant Company v. Haines,* 531 F.2d 671 (2d Cir. 1976), and *International Electronics Corporation v. Flanzer,* 527 F.2d 1288 (2d Cir. 1975). *See also, Community Broadcast of Boston, Inc. v. Federal Communications Commission,* 546 F.2d 1022 (D.C. App. 1976), rejecting the approach of *Silver Chrysler.* The number of appeals seeking to overturn the exercise of discretion by lower courts in denying disqualification, and the doubtful advisability of entertaining such appeals, which result in delay and hardship upon plaintiffs obviously ac-

count for the position taken by the Eighth Circuit in the present case and the Sixth Circuit in *Melamed v. ITT Continental Baking Company, supra,* in overruling their prior decisions.

The above instances of criticism, together with the decisions of the Eighth Circuit and the Sixth Circuit indicate that the law on this issue is in a state of flux and that the conflict that now exists between the circuits is not yet settled. There are strong indications that the Courts of Appeal themselves, having now experienced this issue firsthand can resolve and appear to be resolving this question. Thus, intervention by the Supreme Court if it felt it appropriate to do so may not be necessary to resolve the conflict, and granting the instant petition would therefore result in a wasteful allocation of the Court's valuable resources. Furthermore, neither failing to resolve this issue nor postponing a resolution of it at the Supreme Court level will impose an undue burden on litigants who may be denied automatic appellate review since, as pointed out by the Eighth Circuit, and by the Sixth Circuit in *Melamed,* alternative avenues of review are open in appropriate or extraordinary cases under 28 U.S.C. § 1292(b) or 28 U.S.C. § 1651.

II. Consideration of the question of whether the District Court abused its discretion would not provide this Court the opportunity to consider any significant or substantial question of federal law such as is required for granting certiorari.

The true basis of Firestone's petition begins at page 12 of its petition since Firestone can neither be benefited nor aggrieved by the outcome of a decision by this Court on the issue of appealability. The question which Firestone seeks to have reviewed by this Court does not represent a substantial or significant question of federal law or

policy as required under Rule 19 of the Rules of this Court. No question beyond the litigants in this case or involving federal law with application beyond this case is involved as is required for Supreme Court review. *Rudolph v. United States,* 370 U.S. 269, 270 (1962); *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955). That Firestone realizes this is obvious by its effort to characterize this point as "ancillary" to Point I (Firestone Pet., pp. 15, 20), which it is not. Thus, petitioner seeks to have this Court again review the facts and circumstances amply and adequately considered below both by the District Court and by the Court of Appeals *en banc* and to substitute its evaluation of those facts for that of those Courts. Nowhere in its petition does Firestone indicate, beyond its sense of individual indignation at the result below, any "special and important reasons" which would justify the Supreme Court's entertaining review of this case.

In this context, it must be remembered that the responsibility for promulgation of standards of ethical conduct and for enforcement of the *Code of Professional Responsibility* falls to the bar of the various states. It is not the primary duty of the federal judiciary to police the ethical standards of the bar. The trial court should intervene only where a given factual situation presents an ethical problem that might have an effect upon the litigagation before it or "taint" the trial. *E.g., Board of Education of the City of New York v. Nyquist,* 590 F.2d 1241, 1246 (2d Cir. 1979); *W. T. Grant Company v. Haines,* 531 F.2d 671 (2d Cir. 1976). Even here, the question is a balancing one which must necessarily take into account the various competing interests of the client, the fairness of the trial and the public. *See, e.g., Meat Price Investigators Association v. Spencer Foods, Inc.,* 572 F.2d 163 (8th Cir. 1978).

Thus, the issue of which Firestone seeks a third federal court review is not a special or important question of federal law or its application, but merely an inquiry into whether the actions of the District Court, in this particular case, represented an *abuse of discretion.* This scope of review in disqualification cases followed by the Eighth Circuit in this case and by the other circuits can be found in *Fred Weber, Inc. v. Shell Oil Company,* 566 F.2d 602 (8th Cir. 1977), where the court at page 605 stated as follows:

> We apply the scope of review in disqualification cases described in *Hull v. Celanese Corp.,* 513 F.2d 568 (2d Cir. 1975): "The district court bears the responsibility for the supervision of the members of its bar. [Citing authorities.] The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place. [Citing authorities.]", 513 F.2d at 571.

In *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation,* 518 F.2d 751 (2d Cir. 1975), and in *Allegaert v. Perot,* 565 F.2d 246, 251 (2d Cir. 1977), the courts indicate that great reliance is placed upon the district court's exercise of discretion. *See also, International Business Machines Corporation v. Levin,* 579 F.2d 271, 279 (3rd Cir. 1978), a case heavily relied upon by petitioner in its brief to the Eighth Circuit, and *Waters v. Western Company of North America,* 436 F.2d 1072, 1973 (10th Cir. 1971).

Such a rule was significant through the appeal of this case and is important even in considering Firestone's petition in light of the considerable speculative nature of Firestone's assertions and the factual dispute between the parties. While a recitation of facts is not appropriate for this brief, suffice it to say that in the Courts below (Fire-

stone's statements in its petition notwithstanding), the facts of this case were *not* "essentially" without dispute and the assertions in its petition are *not* "essentially" without contradiction. For example, the strongly worded yet unfounded and speculative assertions by Firestone as to collusive conduct of Risjord, which were rejected by the District Court, were most assuredly the subject of dispute. Similarly, the oft-repeated assertion by Firestone that Risjord had a "long-standing" relationship with Home Insurance Company and the implication that Risjord's now former representation of Home Insurance Company in a fire loss claim is somehow related to his present representation of plaintiffs in product liability claims against Firestone were also disputed. Those facts and arguments of record and their interpretation were known to the District Court judge and only he, much as a trier of fact, could separate truth from speculation. What Firestone is asking the Supreme Court to do is to review and overturn the District Court's resolution of an essentially factual issue, and the Court of Appeals' determination that that resolution was not the product of an abuse of discretion. That is not a part of the Court's certiorari functions. *See, Rudolph v. United States, supra* at 270.

It is because of this previous consideration by the Courts below that Firestone's complaints of an insensitivity to the situation at hand and of the failure to uphold public confidence in the courts are not well taken and do not justify certiorari. Both the District Court and the Court of Appeals had before them all of the facts and arguments asserted by Firestone plus others. Both the District Court and the Court of Appeals had before them the actual consents obtained by Risjord. The Court of Appeals had before it the ruling and reasoning of the District Court. The Court of Appeals, also, had before it a factor not apparent in the Petition of Fire-

stone, the fact that withdrawal by Risjord from his representation of Home had in fact taken place. Such consideration by these Courts must preclude invoking the jurisdiction of this Court.

Petitioner also seeks to premise review by this Court by attacking the application of DR 5-105(A) and (C). The obtaining of consents by the District Court does not represent an unusual or contrary approach which would merit review by this Court as urged by petitioner. Rather, the application by the District Court of Disciplinary Rule 5-105(A) and (C) and the action of the Court of Appeals in finding no abuse of discretion are consistent with the actions of other Courts in similar circumstances. *E.g., International Business Machines Corporation v. Levin, supra; In re Yarn Processing Patent Validity Litigation,* 530 F.2d 83 (5th Cir. 1976); *Messing v. FDI, Inc.,* 439 F.Supp. 776 (D.N.J. 1977); *Acorn Printing Company v. Brown,* 385 S.W.2d 812, 817 (Spr. Mo. App. 1964). None of the cases cited by petitioner indicate that the action of the District Court in requiring consents violates any basic tenant of federal law.[3]

One final point should be emphasized. The interests of the four sets of plaintiffs, represented by Risjord for several years, in having the attorney of their choice, a choice confirmed by the consents filed in this action, must not be lightly disregarded. *See, Meat Price Investigators Association v. Spencer Foods, Inc.,* 572 F.2d 163, 165 (8th

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3. At this point, it is tempting to urge the same arguments put forth before the District Court and the Court of Appeals as to the merits or lack thereof of the position of the respective parties. Such arguments, however, are not appropriate for a consideration of the exercise by this Court of its discretionary jurisdiction. Suffice it to say that substantial basis and authority were provided to the District Court and the Court of Appeals to sustain their respective actions and to reject any claim that the District Court's discretion was not properly exercised or that the state of the facts is such to merit disqualification of Risjord.

Cir. 1978), and *Central Milk Producers Cooperative v. Sentry Foods Stores, Inc.*, 573 F.2d 988 (8th Cir. 1978). This is particularly so in view of the fact that Firestone has never been a client of Risjord, and, thus has no standing to attempt to disqualify him. *See, In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976); *Payne v. St. Louis Grain Corporation*, 562 S.W.2d 102 (St. L. Mo. App. 1977). Further, the dilatory approach taken by Firestone in raising the conflict issue two years after having learned through its counsel of record of Mr. Risjord's representation of Home in the *Cannova* case but not until Risjord became lead and liaison counsel in these proceedings (Record 46) should be taken into account.

Some of the very considerations which caused the Eighth Circuit to change its position on appealability in light of the fact that the use of motions to disqualify had become "disguised harassment" (*Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979)) and "common tools of the litigation process, being used . . . for purely strategic purposes" (*Allegaert v. Perot, supra* at 251) are pertinent. They should provide an additional basis for denying certiorari herein. In light of what has occurred below, the interests of plaintiffs, who have suffered serious injuries, in retaining the attorney, whom they have chosen to represent them, and who has done so with considerable effort for a considerable period of time, should not be overlooked. Those interests militate strongly against a further delay of the prosecution of their personal injury actions against Firestone by granting the instant petition.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari of the Firestone Tire & Rubber Company should be denied.

Respectfully submitted,

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